Jenwen Sdn Bhd v Rich Marvellous Sdn Bhd (Lee Chun Heng (trading a partner in Chun Heng Tractor Earth Works) & Anor, third parties)

HIGH COURT (TEMERLOH) — CIVIL SUIT NO CB-22NCVC-10–11 OF 2020
ROSLAN MAT NOR JC
24 JUNE 2021

Civil Procedure — Summary judgment — Triable issues — Whether defendant raised triable issues — Whether there was an allegation of fraud and conspiracy — Rules of Court O 14

This was the plaintiff's summary judgment application ('encl 15') seeking for an order for a declaration and monetary claims against the defendant. The plaintiff was granted a mining lease by the state authority of Pahang on 1 August 2001. The said mining concession had been renewed several times. The latest renewal of the mining concession was for the period 1 July 2020 until 20 June 2025. In respect of the mining concession for the period 1 July 2018 to 30 June 2020, the plaintiff agreed for the defendant to carry out the mining works on the said mining land. The plaintiff's application for summary judgement against the defendant was for the return of possession of mining land to the plaintiff and an outstanding amount of RM312,286.09 due to the plaintiff. The main contention of the plaintiff was that sometime in February 2019, the plaintiff received a complaint from the Jabatan Mineral dan Geosains Malaysia Negeri Pahang with regards to operational issues on the said mining land which resulted in a stoppage notice. The plaintiff claimed that the defendant's failure to carry out the operation in an orderly, skillful manner was tantamount to breach a contract which entitled the plaintiff to issue of notice of breach of contract dated 21 October 2019. The plaintiff also claimed that the defendant failed to make payment due for the selling of tin ore for the month March, May and October 2019. Thus, the plaintiff decided not to extend the contract with the defendant as a contractor which was due to be expire on 30 June 2020. The plaintiff issued a notice to the defendant on 11 June 2020 conveying his decision not to continue or renew the contract. The defendant had to vacate and return possession of the mining land to the plaintiff by 1 July 2020. The defendant denied breach any terms of contract but admitted the outstanding debt the sum of RM312,386.09 due to the plaintiff. The defendant refused to vacate and return possession of mining land to the plaintiff. The defendant contended that they should be allowed to carry on as the contractor on that mine as agreed by both parties. The defendant argued that there were triable issues which required further enquiry by the court and

this was not a plain and obvious case for the plaintiff to enter a summary judgment.

Held, allowing the application with costs:

(1) There were no triable issues raised by the defendant. The termination of the contract was in accordance with the contract. This was simpliciter termination of contract, even though involving mining concession. The notice of intention not to extend the contract was issued upon the expiry of the contract. The plaintiff should not be denied from exercising his right under the contract (see paras 31 & 33).

(2) It was observed that the defendant had spent extensively on the said land for last 15 years. The defendant was entitled to claim for any loss due to the termination of the contract. However, the plaintiff should not be denied his right to be in possession of the land upon the expiry of the contract in which the defendant contended the termination of the contract was influenced by the third party. The contract was between the plaintiff and the defendant. The plaintiff was only enforcing his right under the contract. It had nothing to do with the third party. Therefore, there was no triable issue raised by the defendant on this issue (see para 34).

[Bahasa Malaysia summary

Ini adalah permohonan penghakiman terus plaintif ('lampiran 15') yang memohon perintah deklarasi dan tuntutan pampasan terhadap defendan. Plaintif telah diberi pajakan perlombongan oleh pihak berkuasa negeri Pahang pada 1 Ogos 2001. Konsesi perlombongan tersebut telah diperbaharui beberapa kali. Pembaharuan terkini konsesi perlombongan adalah untuk tempoh 1 Julai 2020 hingga 20 Jun 2025. Berhubung dengan konsesi perlombongan bagi tempoh 1 Julai 2018 hingga 30 Jun 2020, plaintif bersetuju supaya defendan menjalankan kerja-kerja perlombongan di atas tanah perlombongan tersebut. Permohonan plaintif untuk penghakiman terus terhadap defendan adalah untuk pemulangan pemilikan tanah perlombongan kepada plaintif dan jumlah tertunggak sebanyak RM312,286.09 yang perlu dibayar kepada plaintif. Tuntuatan utama plaintif adalah bahawa pada Februari 2019, plaintif menerima aduan daripada Jabatan Mineral dan Geosains Malaysia Negeri Pahang berhubung isu operasi ke atas tanah perlombongan tersebut yang mengakibatkan notis pemberhentian dikeluarkan. Plaintif menghujahkan bahawa kegagalan defendan menjalankan operasi dengan teratur dan mahir adalah menjurus kepada pelanggaran kontrak yang memberi hak kepada plaintif untuk mengeluarkan notis pelanggaran kontrak bertarikh 21 Oktober 2019. Plaintif juga mendakwa bahawa defendan gagal membuat pembayaran kerana menjual bijih timah bagi bulan Mac, Mei dan Oktober 2019. Oleh itu, plaintif memutuskan untuk tidak melanjutkan kontrak dengan defendan sebagai kontraktor yang akan tamat tempoh pada 30 Jun

2020. Plaintif mengeluarkan notis kepada defendan pada 11 Jun 2020 yang menyerahkan notis untuk tidak meneruskan atau memperbaharui kontrak. Defendan terpaksa mengosongkan dan mengembalikan pemilikan tanah perlombongan itu kepada plaintif berkuatkuasa 1 Julai 2020. Defendan menafikan pelanggarakan mana-mana terma kontrak tetapi mengakui hutang tertunggak berjumlah RM312,386.09 yang perlu dibayar kepada plaintif. Defendan enggan mengosongkan dan mengembalikan pemilikan tanah perlombongan kepada plaintif. Defendan berpendapat bahawa mereka harus dibenarkan untuk meneruskan sebagai kontraktor di lombong tersebut seperti yang dipersetujui oleh kedua-dua pihak. Defendan berhujah bahawa terdapat isu-isu untuk penentuan mahkamah ini dan ianya bukan satu kes yang jelas bagi plaintif untuk memasukkan penghakiman terus.

Diputuskan, membenarkan permohonan dengan kos:

(1) Tiada isu-isu yang boleh dibicarakan yang dibangkitkan oleh defendan. Penamatan kontrak adalah selaras dengan kontrak tersebut. Ini adalah penamatan kontrak yang mudah, walaupun melibatkan konsesi perlombongan. Notis untuk tidak melanjutkan kontrak dikeluarkan apabila kontrak tersebut tamat. Plaintif tidak boleh dinafikan daripada melaksanakan haknya di bawah kontrak (lihat perenggan 31 & 33).

(2) Mahkamah ini mendapati bahawa defendan telah membelanjakan sejumlah wang yang besar untuk urusan di atas hartanah tersebut selama 15 tahun yang lalu. Defendan berhak menuntut kerugian akibat penamatan kontrak tersebut. Walau bagaimanapun, plaintif tidak boleh dinafikan haknya untuk memiliki tanah tersebut apabila tamat kontrak di mana defendan berpendapat penamatan kontrak tersebut dipengaruhi oleh pihak ketiga. Kontrak tersebut antara plaintif dan defendan. Plaintif hanya menguatkuasakan haknya di bawah kontrak tersebut. Hal ini tidak melibatkan pihak ketiga. Oleh itu, tiada isu yang boleh dibicarakan oleh defendan mengenai isu ini (lihat perenggan 34).]

Cases referred to

American Express Sdn Bhd v Dato Wong Kee Tat & Ors [1990] 1 MLJ 91; [1990] 1 CLJ Rep 1, SC (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)

Damansara Realty (Pahang) Sdn Bhd v Om Cahaya Mineral Asia [2021] 5 MLJ 1; [2021] 5 CLJ 283, CA (distd)

Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183; [1987] CLJ Rep 182, SC (refd)

National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300, FC (refd)

Sumbangan Aneka Sdn Bhd v KNK Development Sdn Bhd & Ors [2021] 4 MLJ 514; [2021] 1 LNS 668, FC (refd)

Legislation referred to

Mineral Enactment Pahang 2001
Rules of Court 2012 O 14

Alan Chan (Vaasan Chan & Chandran) for the plaintiff.
Jason Ng Kau (Candice Shin, Clarence Hong and Victoria Tey Zi Xin with him) (Lee Sok Wah & Co) for the defendant.
Alan Chan (Vaasan Chan & Chandran) for the third parties.

Roslan Mat Nor JC:

FACTS

[1] The plaintiff was granted a mining lease by the state authority of Pahang on 1 August 2001. The said mining concession has been renewed several times. The latest renewal of the mining concession was for the period 1 July 2020 until 20 June 2025.

[2] In respect of the mining concession for the period 1 July 2018 to 30 June 2020 the plaintiff agreed for a defendant to carry out the mining works on the said mining land.

[3] The said agreement was exhibited in the plaintiff affidavit and not disputed.

[4] The plaintiff's application for summary judgement against the defendant is for:

(a) the return of possession of mining land to the plaintiff; and

(b) an outstanding amount of RM312,286.09 due to the plaintiff.

[5] In short, the plaintiff seeks an order for a declaration and monetary claims against the defendant. The main contention of the plaintiff is that some time in February 2019 the plaintiff received a complaint from the Jabatan Mineral dan Geosains Malaysia Negeri Pahang as regards of operational issues on the said mining land which resulting to a stoppage notice. The plaintiff claims that defendant failure to carry out the operation in orderly, skillful, tantamount to breach a contract which entitle the plaintiff to issue of notice of breach of contract dated 21 October 2019.

[6] The plaintiff also claims that the defendant fails to make payment due for the selling of tin ore for the month March, May and October 2019.

[7] Thus, the plaintiff decided not to extend the contract with the

defendant as a *contractor which was due to be expire on 30 June 2020. The plaintiff issued a notice* to defendant on 11 June 2020 conveying his decision not to continue or renew the contract. defendant have to vacate and return possession of the mining land to the plaintiff by 1 July 2020.

[8] The defendant denies breach any terms of contract. But, admitted the outstanding debt the sum of RM312,386.09 due to the plaintiff.

[9] The defendant refused to vacate and return possession of mining land to the plaintiff. There is no evidence the plaintiff and defendant had agreed to renew the said contract beyond 30 June 2020.

[10] The defendant contended that they should be allowed to carry on as the contractor on that a mine as agreed by both parties. They argue there are triable issues which required of further enquiry by this court. This is not a plain and obvious case for the plaintiff to enter a summary judgment. The triable issues are:

(a) the agreement dated 30 September 2005 signed between the third party has assign the defendant or his right entitle in mining agreement dated 24 August 2002. The defendant argued that cl 2.4 of agreement dated 30 September 2005 create a duty for the plaintiff to apply for extension prior to expiry of the mining list;

(b) there is legitimate question whether the plaintiff is now entitled to turn a blind eye and deaf ear to the bargain which is entered between the third party and defendant pursuant to agreement dated 30 September 2005;

(c) the defendant argued that there is fraud and conspiracy between the third party and the plaintiff. Therefore, the court should enquire into such claims; and

(d) there is a counter claim against the plaintiff for a relief:

  (i) declaration that the appointment of the third party to is void and invalid;

  (ii) order for specific document that the plaintiff shall renew a contract of min dated 25 October 2018 for the term commencing from 1 July 2020 and expiry on 30 June 2025; and

  (iii) special damages RM20,601 per day calculating from 1 July 2020.

LAW ON SUMMARY JUDGMENT

[11] Summary judgment is a procedure under the civil procedure to allow a party to obtain the judgment form the defendant if there is no triable issue. In short it will allow plaintiff to obtain judgment in a very plain and obvious cases.

In plain and obvious cases, the plaintiff should not been delay to enjoy his claim against the defendant. On the other hand, the defendant should not be stopped from raising any triable issue which require a further enquiry by the court to determine the claim between parties.

[12] In *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 the Federal court held, inter alia:

> We think it appropriate to remind ourselves once again that in every application under O 14 the first considerations are (1) whether the case comes within the Order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purposes of an application under O 14 the preliminary requirements are:
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> (i) the defendant must have entered an appearance;
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> (ii) the statement of claim must have been served on the defendant; and
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> (iii) the affidavit in support of the application must comply with the requirements of r 2 of the O 14.
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> It is to be observed that a case is not within O 14(a) where no statement of claim has been served on the defendant; (b) where the indorsement on the writ includes a claim or claims outside the scope of O 14 as coming within r 1(2); (c) where the affidavit in support of the application is defective, er in omitting to state the deponent's belief that there is no defence to the claim or part to which the application relates; (d) where the application is made in an action against the Government (O 73 r 5(1)).

[13] In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 the Federal Court reminded a duty of a court in summary judgment application as follows:

> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.
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> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied that it is unarguable,

the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'.

[14] The court have to decide whether this is a plain and obvious case which entitle a plaintiff for a summary judgment, Is there any triable issue raise buy the defendant?

SALIENT FACTS

[15] The plaintiff was granted a concession of mining land by a state authority under Mineral Enactment Pahang 2001. The plaintiff and defendant entered into an agreement for the defendant on behalf of plaintiff to manage and operate the said mine on terms and condition agreed between them. There is contractual relationship between plaintiff and defendant. Therefore, the court shall perused the terms and condition of the said agreement in order to determine obligation of parties and any breach by parties contract. The first agreement between the plaintiff and defendant was signed on 20 August 2002. Furthermore, the contract was terminated and revoke via deed of termination and re assignment dated 30 September 2005.

[16] On 28 July 2006 there was supplementary agreement between the plaintiff and the defendant. This agreement is to regulate the right an obligation of parties under the previous agreement 30 September 2005. And there is a clause relating to concession stop it on mining operation. Subsequently there is also another supplementary agreement dated 4 October 2011 which refer to the agreement of 30 September 2005 supplementary agreement of 28 July 2006 and the parties express their wishes to further regulate the right an obligation under the previous agreement. And in there is agreement there is a clause under cl 2.1 as follows:

2.1 the concessionaire has been granted an extension of the Concession by Pejabat Pengarah Tanah dan Galian Pahang dive letter dated 14.7.2011.

2.2 the first party hereby agrees to allow the second party to act as their contractor to mine for metals in the concession for a period of ONE (1) year from the date hereof.

[17] There is provision of cl 4 of the said agreement as regard to breach the agreement as follows:

4. BREACH OF THIS AGREEMENT

4.1 if at any time after the execution of this Further Supplementary agreement the second party breaches any term or condition of this Further Supplementary Agreement of the Agreements, the First Party shall be entitled to give a notice to the Second Party requiring the Second Party to remedy the said breach within SEVEN

(7) days of receipt of the letter failing which the First Party shall be entitled to terminate the agreements and this further supplementary Agreement forthwith without further notice.

[18] On 8 November 2016 both parties had entered into another supplementary agreement but maintaining a same clause relating to breach of the agreement.

[19] Based on the terms and condition of the agreement it is crystal clear that if the defendant (second party in the agreement) breach any of the terms in the agreement the plaintiff may issue a notice for the defendant to remedy the breach. If the defendant fails to remedy the said breach the plaintiff entitle to terminate the agreement and supplementary agreement without further notice.

[20] So, in short, a breach in any term of contract by the defendant will entitle the contract to be terminate by the plaintiff. However, it is a question a fact and evidence to determine whether there is any breach by the defendant. In this case whether a notice issued by a plaintiff to the defendant for them to rectify complaint by Jabatan Geosains Pahang is sufficient for a plaintiff to issue notice of termination? Whether it is proper for this court to investigate further into any breach the contact or what so ever. Is this a simpliciter notice of reach of contract? But in this case the notice of termination was not in pursuant of ratification notice earlier.

[21] The termination notice was issue upon expiry of the said contract. Prior to that notice, defendant was notified by the plaintiff about the complaint from Jabatan Mineral dan Geosains Pahang. defendant was giving a time to response and to ratified the complaint. But the defendant failed to take any action or communicated to the plaintiff his intention to ratify the complaint.

[22] In this case the court must recognise that defendant spend a substantial amount of money to manage and operate the mine. defendant must have invested extensively to ensure the smooth running of the mill. In fact, the contract between plaintiff and defendant was continuously renewed for the past 15 years. Upon perusing affidavit in support and affidavit in reply of this application there is no iota of evidence to suggest there was any contentious issues between them before. Their relationship seems to be very cordial.

[23] The plaintiff emphasised that this application is only for them to take possession of the land which belongs to them. If the court dismiss this application the right of the plaintiff to be in possession of his land will be jeopardise.

[24] The defendant in his counterclaim prays for damages of RM20,601 per day from 1 July 2020 until final disposal of this case. The defendant claims based on the contract was unjustly terminated by the plaintiff, he suffered losses. The defendant plead the plaintiff owe a duty to make application to state authority for a renewal of mining concession. The plaintiff failure to fulfill his obligation under cl 2.4 of the main contract is tantamount to breach of contract.

ARE THOSE ISSUES RAISE BY THE DEFENDANT IS A TRIABLE ISSUE?

[25] In *American Express Sdn Bhd v Dato Wong Kee Tat & Ors* [1990] 1 MLJ 91; [1990] 1 CLJ Rep 1 Harun Hashim J explained the nature of O 14 application as follows:

> The respondents contested the O 14 application on the ground that there are triable issues and sought unconditional leave to defend. Before the Senior Assistant Registrar, the learned Judge and again before us, it was argued in any event that as questions of law should not be determined in an O 14 application but by way of a preliminary issue under O 33, the appellants are not entitled to summary judgment. The point raised has been adequately dealt with by this Court in *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183; [1987] CLJ Rep 182 where at p 184 it was held:
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> > First, the court hearing an O 14 application should work within the framework of O 14 and not embark on an exercise under O 33 r 2 which empowers the court to determine any question or issue arising in a cause or matter whether of fact or law or partly of fact or partly of law before the trial of the cause or matter. Order 33 r 2 is entirely for a different purpose. Secondly, where the issue raised is solely a question of law pure and simple without reference to any facts or where the facts are clear and undisputed the court should exercise its duty under O 14 as in any other cases and decide on the question of law. This is so even if the issue of law raised is a difficult one. If the court after considering the argument is satisfied that it is really unarguable then the court should grant summary judgment.

[26] Hashim Yeop Sani SCJ in *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183; [1987] CLJ Rep 182 explained:

> The approach to be taken by an appellate court in an O 14 appeal has been settled. The first principle is that the appeal court should not regard the appeal as a reviewing of the exercise of the judge's discretion but should in practice approach the appeal as a rehearing. This principle is already accepted by this court in *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283; [1984] 1 CLJ Rep 283 which was also an O 14 appeal where this court considered and followed *European Asian Bank v Punjab and Sind Bank* [1983] 2 All ER 508.
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> What is involved in the present appeal is the other principle considered in European Asian Bank by Goff LJ (as he then was) that is, what happens when a legal issue is

raised by the defence in an O 14 application. In this regard several principles are involved. Firstly, the court hearing an O 14 application should work within the framework of O 14 and not to embark in an exercise under O 33 r 2 which empowers the court to determine any question or issue arising in a cause or matter whether of fact or law or partly of fact or partly of law before trial of the cause or matter. Order 33 r 2 is entirely for a different purpose. Secondly, where the issue raised is solely a question of law pure and simple without reference to any facts or where the facts are clear and undisputed the Court should exercise its duty under O 14 as in any other cases and decide on the question of law. This is so even if the issue of law raised is a difficult one. If the court after considering the argument is satisfied that it is really unarguable then the court should grant summary judgment.

In *Cow v Casey* [1949] 1 All ER 197 the legal question contended by the defence to be reasonably arguable was the point of law on subtenancy and the protection of the Rent Restriction Acts. Lord Greene MR said at p 481:

> If a point taken under the Rent Restriction Acts is quite obviously an unarguable point, the court has precisely the same duty under O 14 as it has in any other case. It may take a little longer to understand the point and to be quite sure that one has seen all round it in a case under the Rent Restriction Acts than in other cases, but when the point is understood and the court is satisfied that it is really unarguable, the court has the duty to apply the rule, and, in my opinion, the Master was perfectly right, the judge was perfectly right, and the appeal should be dismissed.

Referring to *Cow v Casey* Goff LJ if *European Asian Bank* said at p 516 on the functions of the appellate court:

> But where the appeal raises a question of law, this court may be more ready to interfere. Moreover, at least since *Cow v Casey* [1949] 1 All ER 197; [1949] 1 KB 474, this court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under O 14 even if the question of law is at first blush of some complexity and therefore takes 'a little longer to understand'. It may offend against the whole purpose of O 14 not to decide a case which raises a clear-cut issue, when full argument has been addressed to the court, and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a judge, with the possibility of yet another appeal.

It should be noted however that Goff LJ was cautious in his language when he said where *'a clear-cut issue'* is raised and *'when full argument has been addressed to the Court'*. For it may offend the purpose of O 14 for the court not to decide a case which raises a clear-cut issue of law and when the court has the benefit of full argument. We alluded earlier to the issues raised in paras 4 and 12 of the statement of defence which in our view are factors making this case not an appropriate one for summary judgment.

The underlying philosophy in the O 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where

there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

[27] The defendant alleged there was a conspiracy between plaintiff and third party to terminate the said contract which prejudiced his right. The termination of contact is to facilitate the arrangement between plaintiff and third party. There are volumes of document exhibited in affidavits filed by both parties. Furthermore, the both parties admitted that for the last 15 years there was no issue between plaintiff and defendant as regard to terms and condition the contract. Therefore, the defendant expected the contractual relationship will be extended beyond 1 July 2019.

[28] Are those issues raise by the defendant are triable issues? By looking at the facts in the defendant statement of defence and affidavits filed is seems this is a very complicated case which required a further enquiry during a full trial. It related to third party and construction of contracts.

[29] But, it is my considered view that the plaintiff claim is very obvious to enforce his right to take possession of his land upon expiry of agreement with defendant. He is a registered owner of the said land. He was granted a concession from a state government. He sent notice to defendant informing his intention not to extend the contract. The notice was issue after the contract come to end. The notice was issues in accordance with the terms and condition agreed upon by both parties. However, the court must not lose sight that the plaintiff action is so drastic which may prejudice the defendant. The defendant was uprooted and shock which may require a further enquiry as to ascertained whether the termination is right in law.

[30] However, it is not a court duty to rewrite the terms of contract between parties. The court should enforce contractual items strictly and adhere to the intention of parties. Recently, Federal Court reminded again this basic principles of contractual interpretation in *Sumbangan Aneka Sdn Bhd v KNK Development Sdn Bhd & Ors* [2021] 4 MLJ 514; [2021] 1 LNS 668:

> To summarise, what we have decided above basically is to give effect to what the parties themselves have agreed in their agreements as to the particular event that gives rise to the right to terminate and the consequences following such termination. In this regard it is pertinent to reproduce what was held by the House of Lords in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 which was quoted by this court in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177:
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> > *The court does not make a contract for the parties. The court will not even improve the terms which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract*

> *which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been suitable.* An unexpressed term can be implied if and only if courts finds that the parties must have intended that term to form part of their contract. (Emphasis added.)

[31] It is my humble view there is no triable issues raise by the defendant. The termination of the contract is in accordance with the contract. This is simpliciter termination of contract, even though involving mining concession. On this point, court echo with an observation by court of appeal in *Damansara Realty (Pahang) Sdn Bhd v Om Cahaya Mineral Asia* [2021] 5 MLJ 1; [2021] 5 CLJ 283. In *Damansara Realty (Pahang)* court of appeal, inter alia, that party cannot choose the easier path to terminate the contract by issuing a notice of termination within a period of 60 days. They also cannot terminate the contract on ground of illegality. The court opined:

> [126] No doubt, under cl. 5.1 of the agreement, the defendant had the contractual right to terminate the agreement by giving 60 days' notice of termination without ascribing any reasons ie, termination simpliciter. Thus, it was an agreed term that the defendant could terminate the agreement by giving 60 days' notice of termination without predicating it on any reason. However, by the same token, we cannot ignore the fact that the letter of termination had also demanded that the plaintiff should 'cease operations and demobilise immediately'. Clause 5.1 of the agreement reads as: 'This agreement may be terminated by any party by way of giving the other a 30 days written notice of their intention to do so ...'. The period of 30 days was later mutually varied to 60 days.
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> [127] The defendant opted to use this route of termination, ie, termination simpliciter (without cause) rather than termination for cause via cl. 5.1(a) which allowed for termination 'forthwith upon the occurrence of any of the following' — '(a) (the plaintiff) commits, permits or suffers to occur any breach in the due and punctual observance of any of its obligations under this agreement and the same is not remedied accordingly within 14 days after receipt of a notice from (the defendant)'.
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> [128] There is no dispute that the defendant's present complaints against the plaintiff, per the defence, were never raised at the material time. Further, the plaintiff was never afforded the 14 days period as per cl. 5.1(a) so as to regularise or remedy any purported breach.
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> [129] What is clear is that the defendant chose not to rely on any reason for the termination. They chose not to terminate for cause. Instead, they chose the easier path, or the path of least resistance, ie, termination simpliciter. Thus, it was termination with a notice period of 60 days. We do not think that it was open to the defendant to then proffer any purported reasons in seeking to justify the termination.

[32] Court of Appeal also observed:

[143] However, the problem here is that under s 81, it is the owner of alienated land (the defendant) who has to procure the licence. But the defendant maintains that under s 81 of the Mining Enactment, the plaintiff could have applied for a proprietary mining licence. In this case, the defendant did not themselves apply for a licence. Neither did the plaintiff. We do not see how the plaintiff could have made such an application in their own name. Being a third party, the plaintiff could not apply for the requisite licence without a power of attorney.

[144] At any rate, the plaintiff's position is that they could procure a licence later ie, before commencing stage 2 of the works under the agreement to extract minerals. Plainly, the defendant did not themselves apply for a proprietary mining licence.

[145] If the defendant did not apply for the licence, then they ought at the least, to have clothed the plaintiff with the requisite authority by way of a power of attorney to enable them to obtain the requisite licence. But none of that was done. It is important to bear in mind that cl 5.1(a) of the agreement provides that if the plaintiff is in breach, then they should be given 14 days to remedy the breach.

[146] Again, the plaintiff was not given the requisite notice period within which to remedy the breach. It is also significant that PTG took no action against the defendant, or the plaintiff for any breach or contravention of the Mining Enactment. Further, despite having knowledge that the sub-contractor, HTS did not have any licence under the Mining Enactment, the defendant proceeded to pay them RM4.9m.

[147] In our view, the defendant ought to have made it possible for the plaintiff to have procured such a licence for the second stage of the works to be undertaken under the agreement. On this point, we agree that there were two stages of works under the agreement and the plaintiff had completed the first part of the works under the agreement.

[148] Thus, looking at the circumstances here, we do not think that the defendant can rely on illegality to justify the termination of the agreement.'

[33] The facts in *Damansara Realty* can be distinguished with this case. In this case, the notice of intention not to extends the contract was issue upon the expiry of contract. The plaintiff should not be denied from exercised his right under the contract.

[34] The court should also recognise that defendant had spent extensively on the said land for last 15 years. The defendant is entitled to claim for any loss due to the termination of the contract. But, in doing so the plaintiff should not be denied his right to be in possession of the land upon the expiry contract the defendant contended the termination of the contract was influence by third party. This contract is between plaintiff and defendant. The plaintiff is only enforcing his right under the contract. It is nothing to do with third party. Therefore, there is no triable issue raise by the defendant on this issue.

[35] Based on the facts and evidence adumbrated above, the plaintiff application in encl 15 para (a) and (b) hereby allowed with cost.

Application allowed with costs.

Reported by Muhamad Azham Marwan